

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

U.S. BANK NATIONAL ASSOCIATION,	:	APPEAL NO. C-1000154 TRIAL NO. A-0606939
	:	
Plaintiff-Appellee,	:	JUDGMENT ENTRY.
	:	
vs.	:	
	:	
FIRST AMERICAN FUNDING CO.,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellee U.S. Bank purchased a group of mortgages from defendant-appellant First American. One was the mortgage on the home of Mary and Todd Campbell, originated by First American. The appraisal for the purchase, conducted by Value Appraisal, was incorrect. In fact, it was conducted by an appraiser who, the record indicates, never saw the property. The appraisal overstated the property's value at \$185,000, significantly overstated the square footage of the home, and stated that the property had a 2.5-car detached garage, which it did not. A subsequent appraisal, based upon accurate information, set the value at \$125,000. The original, inaccurate appraisal was presented to U.S. Bank by First American as part of the documentation in support of the sale of the group of mortgages and was relied upon by U.S. Bank when it made the decision to purchase the Campbell mortgage.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

The contract between U.S. Bank and First American stated that First American would have to buy back any mortgage if “any of the representations, warranties and covenants made by Seller herein shall be breached or untrue.” The contract indicated that the recovery was to be the purchase price of the mortgage, minus any payment received by U.S. Bank, plus interest. After U.S. Bank learned of the false information in the appraisal, and that the property was worth much less than the appraised value, it requested that First American buy the mortgage back pursuant to the contract. First American refused, and U.S. Bank filed suit for breach of contract. The trial court granted U.S. Bank’s motion for summary judgment and awarded \$73,584.88, plus interest, to U.S. Bank.

On appeal, First American raises two assignments of error. In the first, it argues, for various reasons, that the trial court improperly determined that it had breached its contract with U.S. Bank to repurchase the Campbell mortgage. Summary judgment is appropriate when, because reasonable minds can come to only one conclusion, no issue of material fact exists for trial.² When deciding whether to grant summary judgment, the trial court must construe all evidence most strongly in favor of the nonmoving party.³ If the legal conclusion reached from this version of the evidence is adverse to the nonmoving party, the moving party is entitled to judgment in its favor as a matter of law.⁴

First American’s basic argument is that it made no representations that were false. In its view, Value Appraisal, which the record indicates is no longer in business, had made the false statements. This is an untenable position. The appraisal was provided by First American and was intended, by its own admission, to

² *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, at ¶23; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Stinespring v. Natorp Garden Stores* (1998), 127 Ohio App.3d 213, 215, 711 N.E.2d 1104.

³ *Id.*

⁴ *Id.*

be relied upon by U.S. Bank in its decision to purchase the mortgage. The fact that the document was prepared by another company did not make it any less a representation by First American. This is especially true of the inaccuracies in the physical description of the property—the exaggerated square footage and the phantom 2.5-car garage. And it does not matter that First American was not at fault because, with the evidence construed in its favor, it did not know the statements were false. The contract only required that a representation be made and that representation be untrue.

The trial court properly determined that U.S. Bank was entitled to recourse under the repurchase provision of the contract. First American's first assignment of error is overruled.

In its second assignment of error, First American argues that the trial court improperly computed the damage award. It is correct, but not for the reasons it argues. First American argues that the award did not take into account any money U.S. Bank may have been receiving from the Campbells during the litigation. But there is a more basic problem than this.

The trial court based its damage award on the amount that the Campbells still owed on the mortgage. The Campbells sold the property, but only for \$116,000—less than what they owed. According to the affidavit filed by U.S. Bank, the Campbells still owed \$73,584.88 to U.S. Bank. This was the amount that the trial court awarded.

But that was not the formula set in the contract. The contract stated that the repurchase price was the purchase price of the mortgage, minus any payment received by U.S. Bank, plus interest. Both parties have addressed the damages issue in terms of the \$185,000 mortgage. But nowhere in the record have the parties established the purchase price of the mortgage. Therefore, on remand, such evidence must be presented. The trial court must conduct a damages hearing so that

an award, beginning with the purchase price of the mortgage and based upon the formula stated in the contract, can properly be calculated.

For the reasons stated above, First American's second assignment of error is sustained.

The judgment of the trial court is reversed, and this cause is remanded for a hearing on damages consistent with this judgment entry.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 24, 2010

per order of the Court _____
Presiding Judge